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Attorney for Defendant
UNITED PARCEL SERVICE, INC.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

NICHOLAS STEPHENS

Case No.: 3:23-cv-06081-JSC

Plaintiff,

Complaint Filed: October 16, 2023
Trial Date: Not Yet Set

V

UNITED PARCEL SERVICE, INC.

**DEFENDANT UNITED PARCEL
SERVICE, INC.'S REPLY IN
SUPPORT OF MOTION TO
DISMISS PLAINTIFF NICHOLAS
STEPHENS' CORRECTED
AMENDED COMPLAINT**

Defendant.

Date: August 1, 2024
Time: 10:00 a.m.
Judge: Hon. Jacqueline Scott Corley
Dept. 8

Defendant United Parcel Service, Inc. (“UPS”) through its undersigned counsel hereby submits its Reply in Support of its Motion to Dismiss Plaintiff Nicholas Stephens’ (“Plaintiff”) Corrected Amended Complaint (“CAC”).

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1 **I. PLAINTIFF'S OPPOSITION FAILS TO ARTICULATE AN
2 EXCEPTION TO THE WORKERS' COMPENSATION EXCLUSIVITY
3 DOCTRINE**

4 As stated in Defendant's Motion to Dismiss, Plaintiff's sole cause of action for
5 common law negligence is precluded by the workers' compensation exclusivity
6 doctrine. To this point, Plaintiff actually filed a claim with the Workers' Compensation
7 Appeals Board and is still pursuing that claim to this date. In an attempt to sidestep
8 this clear preemptive doctrine, however, Plaintiff cites California Labor Code §
9 3602(b) which provides three narrow exceptions to the workers' compensation
10 exclusivity doctrine. Based on the face of the CAC, none of these exceptions apply in
11 this matter.

12 First, Plaintiff does not allege, nor can he allege, that his injury was caused by a
13 willful physical assault by UPS. *See Cal. Labor Code § 3602(b)(1)*. Instead, Plaintiff
14 argues UPS is vicariously liable for its employee's intentional assault. To support this
15 tenuous theory, Plaintiff cites *Lisa M. v. Henry Mayo Newhall Mem'l Hosp.* (1995) 12
16 Cal.4th 291, 301-02 for the proposition that an employer may be held liable for an
17 assault that is generated by an outgrowth of workplace responsibilities, conditions, or
18 event. This argument is directly abrogated by *Fretland v. County of Humboldt*, Civil
19 No. A078588, 1999 Cal.Wrk.Comp. LEXIS 5227 (1999), which held that liability
20 under § 3602 must be based on positive misconduct by the employer and ***not*** on a
21 theory of vicarious liability. *See Fretland*, 1999 Cal.Wrk.Comp. LEXIS 5227, at * 15.
22 In *Fretland*, the court refused to apply vicarious liability to the employer based on the
23 willful attack on the plaintiff by a co-employee. *Id.*, at *14. The court held that
24 extending vicarious liability in this type of scenario would directly contravene Labor
25 Code §3601(b), which "unambiguously prohibits imposing civil liability on an
26 employer for one employee's assault and battery of another." *Id.*, at * 15; *see also*
27 Labor Code § 3601(b). As such, Plaintiff cannot rely on a vicarious liability theory to
28 support the exception under § 3602(b)(1).

1 Further, the CAC does not allege that UPS ratified Mr. Martin's conduct. In
 2 fact, the CAC indicates that "UPS Security Officer Thomas" investigated Plaintiff's
 3 claims of assault and allowed him to leave work to seek medical care. CAC, at Pg. 4.
 4 There is nothing to indicate that UPS adopted this violent act either expressly or
 5 through implication. *See Rakestraw v. Rodrigues*, 8 Cal.3d 67, 73 (1972). The CAC
 6 also does not allege that UPS failed to discharge Mr. Martin or otherwise respond to
 7 the assault. *See Baptist v. Robinson*, 143 Cal.App.4th 151, 169 (2006); *C.R. v. Tenet*
 8 *Healthcare Corp.*, 169 Cal.App.4th 1094, 1110-11 (2009).¹ For the reasons stated
 9 above, Plaintiff cannot impute Mr. Martin's liability on UPS and bypass the strictures
 10 of the workers' compensation exclusivity doctrine.

11 Plaintiff also cannot avoid the workers' compensation exclusivity doctrine under
 12 Labor Code §3602(b)(2) because the CAC does not allege that Plaintiff's injury was
 13 aggravated by UPS' "fraudulent concealment" of the existence of the injury. *See Cal.*
 14 *Labor Code § 3602(b)(2)*. To support this theory, Plaintiff simply states that UPS
 15 denies the assault. Even accepting Plaintiff's allegation as true, which it is not, denying
 16 that an assault occurred is not concealing the existence of the injury, much less
 17 fraudulently concealing his injury. Moreover, Plaintiff has represented in multiple
 18 pleadings and court appearances that he is pursuing a workers' compensation claim
 19 pertaining to his assault. Clearly, UPS is not concealing the existence of the injury
 20 while Plaintiff seeks his remedies through the workers' compensation tribunal.

21 Plaintiff refers to *Johns-Manville Products Corp. v. Superior Court*, 27 Cal.3d
 22 465 (1980), where the California Supreme Court elaborated on this exception based on
 23 the aggravation of a disease due to the employer's fraudulent concealment of the
 24 conditions of its cause. *See Johns-Manville*, 27 Cal.3d at 477. In that case, the plaintiff
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27 ¹ While outside the pleadings, following the March 22, 2022 altercation, Eric Smith (the Center
 28 Manager) instructed Mr. Griffin that he was not to return to work pending UPS' investigation into
 the matter. Mr. Griffin was on an involuntary leave during the investigation. UPS ultimately
 terminated Mr. Griffin's employment as a result of the investigation.

1 alleged the defendant fraudulently concealed Plaintiff ingested asbestos at work, which
 2 prevented his treatment for the disease. *Id.*, at 477. In permitting this narrow exception
 3 the court recognized that,

4 We conclude the policy of exclusivity of workers'
 5 compensation as a remedy for injuries in the employment
 6 would not be seriously undermined by holding defendant
 7 liable for the aggravation of this plaintiff's injuries, *since we*
cannot believe that many employers will aggravate the
effects of an industrial injury by not only deliberately
concealing its existence but also its connection with
employment.

10 *Johns-Manville*, 27 Cal.3d at 478 (emphasis added). Unlike the admittedly rare
 11 circumstances in *Johns-Manville*, Plaintiff did not contract asbestos or any other illness
 12 that UPS could conceal. Instead, Plaintiff was allegedly assaulted in broad daylight,
 13 UPS Security immediately conducted an investigation into the assault, and Plaintiff has
 14 sought to vindicate his rights through the workers' compensation courts. Neither
 15 Plaintiff's CAC nor his Opposition provide any meaningful analysis as to how UPS
 16 purportedly concealed his alleged injury. Accordingly, this rare exception does not
 17 apply.

18 Finally, Cal. Labor Code § 3602(b)(3) does not apply because Plaintiff's injury
 19 was not proximately caused by a defective product manufactured by UPS. See Cal.
 20 Labor Code § 3602(b)(3). None of the exceptions to the workers' compensation
 21 exclusivity doctrine enumerated in § 3602 apply.

22 **II. PLAINTIFF'S OPPOSITION FAILS TO IDENTIFY ANY
 23 COGNIZABLE LEGAL DUTY UPS OWED TO PLAINTIFF IN THIS
 24 PARTICULAR SITUATION**

25 Plaintiff cannot establish a legal duty of care to support his negligence claim. In
 26 his Opposition, Plaintiff attaches the UPS Business Code of Conduct ("Code of
 27 Conduct") to show that UPS accepted full responsibility for the acts of its employees.
 28 Preliminarily, the terms of the Code of Conduct are mentioned nowhere in the CAC

1 and, thus, Plaintiff cannot rely on this extrinsic document to cure his deficient pleading.
 2 Even if Plaintiff was allowed to amend the CAC to incorporate these terms, the Code
 3 of Conduct merely prohibits workplace violence. It does not instill a legal duty on UPS
 4 to protect its workers from acts of violence. Contrary to Plaintiff's assertion, the Code
 5 of Conduct does ***not*** state that UPS "accepts full responsibility for any misconduct
 6 committed by its employees". *See* Opposition, at Pg. 5. Plaintiff's reliance on the
 7 Code of Conduct to create a legal duty is misplaced.

8 Plaintiff also broadly cites to the Occupational Safety Health Act ("OSHA") and
 9 the California Labor Code to support an ostensible legal duty. However, the legal
 10 prohibitions against retaliation in OSHA and the California Labor Code do not create
 11 a *per se* duty for UPS to protect its employees. To date, Plaintiff has yet to provide
 12 any authority for UPS' alleged legal duty to "provide a safe workplace [sic] safe free
 13 of danger to employees." *See* CAC, Pgs. 4-5. Plaintiff's negligence claim should be
 14 dismissed as a matter of law. *See Montez v. Young Men's Christian Assn. of Glendale,*
 15 *California*, 81 Cal.App.5th 1134, 1139-40 (2022) (restating that the existence of a duty
 16 is question of law for the court).

17 **III. THIS COURT SHOULD NOT CONSIDER PLAINTIFF'S EXTRINSIC 18 EVIDENCE WHEN DECIDING THIS MOTION TO DISMISS**

19 As discussed above, Plaintiff's Opposition introduces extrinsic evidence,
 20 specifically, UPS' Code of Business Conduct and a Liberty Mutual correspondence.
 21 Plaintiff's Opposition also introduces a myriad of new facts that are nowhere to be
 22 found in the CAC. Although Plaintiff cannot save his CAC with or without this
 23 extrinsic evidence, the Court may not consider extrinsic evidence as a threshold issue.
 24 In deciding a Rule 12(b)(6) motion, a court may only consider "allegations contained
 25 in the pleadings, exhibits attached to the complaint, and matters properly subject to
 26 judicial notice." *Swatz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). Here,
 27 Plaintiff's Opposition asserts many supposed "facts" that are nowhere to be found in
 28 the four corners of his CAC, and the exhibits attached thereto. For example, Plaintiff

1 alleges Mr. Smith was a legally defined representative of UPS, and Plaintiff mentions
2 and attaches several documents that are not discussed in Plaintiff's CAC. Plaintiff
3 cannot rely on extrinsic evidence to oppose Defendant's Motion to Dismiss. As such,
4 the Court should not consider this evidence when deciding this Motion to Dismiss.

5 **IV. CONCLUSION**

6 For the reasons stated above, UPS respectfully requests this Court dismiss
7 Plaintiff's CAC with prejudice.
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9 Dated: July 12, 2024

DINSMORE & SHOHL LLP

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11 By: /s/ Robert D. Prine
12 ROBERT D. PRINE
13 Attorney for Defendant,
14 UNITED PARCEL SERVICE, INC.
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on July 12, 2024, to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per L.R. 5-1. Any party or counsel of record who have not consented to electronic service through the Court's CM/ECF system will be served by electronic mail, first class mail, and/or overnight delivery as indicated below:

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I declared under penalty of perjury under the laws of the United States of America that the above is true and correct.

/s/ Robert D. Prine
ROBERT D. PRINE